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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
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Surface Transportation Board  
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ENTERED  
Office of Proceedings

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Part of  
Public Record

Dear Ms. Brown:

Attached for filing in Docket No. EP 699, Assessment of Mediation and Arbitration Procedures, are the Comments of Transportation Arbitration and Mediation, P.L.L.C.

If you have any questions concerning the filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,

  
Fritz R. Kahn

**SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

**Docket No. EP 699**

**ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES**

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**COMMENTS  
OF  
TRANSPORTATION ARBITRATION AND MEDIATION, P.L.L.C.**

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**TRANSPORTATION ARBITRATION AND MEDIATION, P.L.L.C.**

**Dated: October 4, 2010**

SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

Docket No. EP 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

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COMMENTS  
OF  
TRANSPORTATION ARBITRATION AND MEDIATION, P.L.L.C.

Introduction

Transportation Arbitration and Mediation, P.L.L.C. ("TAM") is an organization which provides Board and Interstate Commerce Commission experienced and industry knowledgeable professionals for the arbitration or mediation of a wide variety of disputes between shippers and carriers.

TAM was established to manage the arbitration of appeals from decisions revising classification ratings by the National Classification Committee of the National Motor Freight Traffic Association, as mandated by the Board.<sup>1</sup> Following the Board's revocation of the antitrust immunity of the Committee,<sup>2</sup> a successor agency was established, the Commodity Classification Standards Board, the procedures of which provide that any party of record may set for arbitration the disposition of a docketed proposal. TAM has been designated as the organization from whose roster of qualified personnel an arbitrator may be selected.

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<sup>1</sup> See, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement, served March 27, 2003.

<sup>2</sup> See, STB Ex Parte No. 656 (Sub-No. 1), Investigation into the Practices of the National Classification Committee, served May 7, 2007.

TAM also has been chosen by the Transportation Intermediaries Association to provide arbitration and mediation services under its Platinum Performance Program.

TAM commends the Board for its long and dedicated advocacy of alternative dispute resolution procedures and for its very effective use of mediation to arrive at negotiated settlement of disputes which otherwise would need to be decided by the Board. The following are comments offered for the Board's consideration in response to the invitation it extended by its Decision, served August 20, 2010.

#### Informal Mediation

The Section of External Affairs of the Board's Office of Public Assistance, Governmental Affairs and Compliance already does an excellent job of assisting persons with problems which fall within the jurisdiction of the Board, without, however, the need for the person contacting the Section to institute a formal proceeding before the Board. The request may be that of a short line railroad, but more often it is that of a shipper, displeased with the rate it is assessed or service it is receiving from the railroad serving it. The Section may discuss the matter with the person, indicating what, if any, remedies may be available under ICCTA. At the request of the person, the Section may discuss the subject of the complaint with the party which was the subject of the contact without, however, disclosing the identity of the person. At other times, the Section, with the consent of the contacting party, may initiate three-party negotiations to try to resolve the matter in dispute.

The Board's web page offers a partial description of the Section's activity, namely, its Rail Consumer and Public Assistance Program. As far as the public is

concerned, however, the work of the Section of External Affairs is a deep dark secret. The web page summary does not constitute the dissemination of the information to the public. That would be the function of the Federal Register and the Code of Federal Regulations, but the Section's organization, functions and jurisdiction, however, have been disclosed in neither publication.

Section 3(a) of the Administrative Procedure Act, as amended, 5 U.S.C. §552(a), in part, provides:

Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organizations and the established places at which, the employees . . . from whom, and the methods whereby the public may obtain information, make submittal or requests, or obtain decisions:

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and *informal procedures* available \* \* \* [emphasis added].

Pursuant to section 11 of the Federal Register Act, as amended, 44 U.S.C. §1510, agency documents of general applicability and legal effect are codified and published in the Code of Federal Regulations. Other administrative agencies' informal alternative dispute resolution procedures can be found in the C.F.R., as, for example, that of the Equal Employment Opportunity Commission at 29 C.F.R. §1601.23, *et seq.*, the Federal Energy Regulatory Commission at 18 C.F.R. §388.104, and the Federal Maritime Commission at 46 C.F.R. §502.401.

Assistance in establishing an agency's informal alternative dispute resolution program can be found in A Guide for Federal Employee Ombuds, retrievable at

[www.adr.gov](http://www.adr.gov). Consistent with the directions of the Guide, TAM recommends the insertion of the following in the Federal Register as a notice of proposed rulemaking and, in the absence of adverse comments, its publication in the C.F.R.:

**“PART 1107 – INFORMAL ALTERNATIVE DISPUTE RESOLUTION**

**§1107.1 Definitions**

(a) *Complainant*. The person or entity contacting the Section of External Affairs for its assistance in informally providing information or offering help to resolve an issue within the jurisdiction of the Board shall be referred to as the complainant.

(b) *Respondent*. The person or entity identified by the complainant as the one with which it has a disagreement or dispute shall be referred to as the respondent.

(c) *Board*. The Surface Transportation Board shall be referred to as the Board.

(d) *Section*. The Board’s Section of External Affairs shall be referred to as the Section.

**§1107.2 Statement of organization, purpose and jurisdiction**

(a) The Board’s Office of Public Assistance, Governmental Affairs and Compliance shall include a Section of External Affairs. The Section shall be chaired by the Chief of the Section and, insofar as practicable, shall be staffed by personnel having had shipping and/or railroad industry experience, as well as service with the Board of sufficient length to have become knowledgeable of its governing statutes, implementing regulations and precedential decisions.

(b) The Section shall be available to persons seeking assistance to try to resolve informally issues within the jurisdiction of the Board, typically shipper grievances about a railroad’s rates or services. The Section shall discuss the matter with the complainant, usually by telephone, and, if deemed to be helpful in trying to arrive at a solution, make

inquiry of the respondent, without, however, disclosing the identity of the complainant. On the other hand, if the complainant agrees to the disclosure of its identity, the Section can more thoroughly examine the matter with the respondent and, indeed, can set up one or more three-way telephone conference calls, which well may be productive in resolving the disagreement between the parties. If the Section is unable to have the matter resolved to the complainant's satisfaction, the complainant may elect to take up the matter in a formal proceeding before the Board.

#### 1107.3 Independence, impartiality and confidentiality

(a) The Section is completely independent from the Offices of the Chairman, Vice Chairman and Commissioner of the Board and from any of the office chiefs and their staffs having regulatory responsibilities. The Chief of the Section shall not disclose any information relating to the matters which were the subject of the Section's informal handling, and, if the matter is not resolved informally and subsequently is brought to the Board for its formal handling, the recommendations of the Section will not be sought by the Board members or the Board's staff participating in the disposition of the proceeding.

(b) The Section shall conduct its inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest.

(c) The Section shall not disclose and is not required to disclose information provided to it in confidence. Records pertaining to a complaint, inquiry or investigation are confidential and not subject to disclosure outside the Section's office.

#### 1107.4 Limitations on the authority of the Section of External Affairs

(a) The Section cannot make, change or set aside a governing law, implementing regulation, policy pronouncement or decisions of the Board.

(b) The Section cannot render binding decisions or determine definitive rights and shall be without power to compel either the complainant or the respondent to implement the Section's recommendations.

(c) The Section shall not handle informal rate complaints, pursuant to 49 C.F.R. Part 1130 – INFORMAL COMPLAINTS.

(d) The Section shall not address any issue arising under an employee protective condition imposed by the Board, a collective bargaining agreement or which falls within the purview of any federal, state or local labor or employment law or regulation.

(e) The Section shall not act in a manner inconsistent with the grant of and limitations on the jurisdiction of the Section. “

#### Arbitration

The occasions when arbitration will be used as an alternative dispute resolution mechanism before the Board are rare. The Board, at 49 C.F.R. §1108.2(c) is insistent that its promulgation of the regulations of **PART 1108—ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD** was premised on “the authority of the Board to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate and not pursuant to the Administrative Dispute Resolution Act, 5 U.S.C. 571, *et seq.*” Nevertheless, the Board, at 49 C.F.R. §1108.3, makes it perfectly clear that arbitration is available only if the parties agree to such a proceeding, and that very same prerequisite is mandated by the Administrative Dispute Resolution Act, 5 U.S.C. §575(a).



The agreement to submit a controversy to arbitration ordinarily is contained in the document to which the parties are signatories. An arbitration provision often can be found in rail carriers' operating agreements, track leases and rate agreements or contracts. Arbitration is thought to be a quicker and cheaper way of settling a dispute arising from application of the provisions of the document which could not be resolved informally than bringing suit and trying the matter in court, although that premise is open to question. If one or another of the signatories of the document can initiate and prosecute an arbitration proceeding through the processes of the American Arbitration Association or some other organization, including TAM, the need for instituting a proceeding before the Board is obviated. Indeed, the Board's involvement is foreclosed, for under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, the decision of the arbitrator or panel of arbitrators is reviewable only in a U.S. District Court and subject to being set aside on few and narrow grounds.

TAM is unaware of any Board proceeding in which the parties have agreed to submit the controversy to arbitration rather than have the Board render a decision. To be sure, arbitration is mandated by the employee protective conditions of New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979), aff'd sub nom., New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979), Norfolk Western Ry. Co.—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605, 610-615 (1978), modified by Mendocino Coast Ry. Inc.—Lease and Operate—California W. R.R., 360 I.C.C. 653, aff'd sub nom., Railway Labor Executives' Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982), and Oregon Short Line R.R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), routinely imposed by the Board in

merger, trackage rights and abandonment proceedings. See, STB Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation, et al.—Control and Merger—Southern Pacific Rail Corporation, et al., served February 28, 2006; Docket No. FD 35408, Stillwater Central Railroad, Inc.—Trackage Rights Exemption—BNSF Railway Company, served September 15, 2010; Docket No. AB 415 (Sub-No. 2X), Escanaba & Lake Superior Railroad Company—Abandonment Exemption—in Ontonagon and Houghton Counties, Mich., served September 27, 2010. The Board imposed employee protective conditions, however, had their origin in the Washington Job Protection Agreement of May 21, 1936, which provided for resolution of disputes which could not be resolved by negotiations between the railroads and their employees' unions by a procedure analogous to arbitration. The Washington Job Protection Agreement was signed by the representatives of the Nation's railroads and of the brotherhoods representing their employees. In other words, the railroads and their unions agreed to arbitrate their disagreements well in advance of the institution of the Board proceedings in the decisions of which the employee protective conditions are imposed. In any event, 49 C.F.R. §1108.2(b) specifically states, in part, "[These procedures shall not be] available for arbitration that is conducted pursuant to labor protective conditions."

The only other proceeding of which TAM is aware in which the Board provided for arbitration is Assn. of American Railroads et al.—Agreement—49 U.S.C. 10706, 3 S.T.B. 910 (1998), which approved the agreement between the Association of American Railroads and the American Short Lines and Regional Railroad Association by which the two groups' members signing the agreement sought to resolve some of their disputes arising from the paper barriers which invariably were included in marginal railroad line

sales contracts or leases. Again, to TAM's knowledge, only one short line railroad ever has filed complaints, pursuant to 49 C.F.R. §1108.7(a), seeking to have its paper barrier controversies with the Class I railroad from which it purchased or leased a railroad line resolved by arbitration, and the short line railroad withdrew its complaints before an arbitrator could render a decision on the merits. Docket No. NOR-42089, Albany & Eastern Railroad Company v. The Burlington Northern and Santa Fe Railway Company, filed November 12, 2004, dismissed May 10, 2005; Docket No. NOR-42076, Albany & Eastern Railroad Company v. The Burlington Northern and Santa Fe Railway Company, filed November 26, 2002, dismissed December 29, 2003.

As infrequently as the Board's arbitration provisions may be invoked, TAM believes 49 C.F.R. §1108.8(f) is far too loosely worded to protect adequately confidential, proprietary or commercially sensitive material which could cause serious competitive injury. In its stead, TAM recommends the following paragraph should be inserted:

"(f) A party submitting materials, whether in its complaint, answer, other pleading or discovery responses, which it believes is entitled to be kept confidential, shall file a request for a protective order, in accordance with 49 C.F.R. §1104.14(b), attaching a draft protective order to the request, which request, if found to be reasonable, shall be granted by the Arbitrator. The Arbitrator may consider the confidential information in preparing the decision; however, such information shall not be divulged in the Arbitrator's decision."

49 C.F.R. §1109.02 largely is repetitive of 49 C.F.R. §1108.11(a) but includes differently worded provisions of minor significance which, however, well may invite ambiguity. In the opinion of TAM, the text of section 1109.2 should be stricken.

#### Mediation in Board proceeding

As Part 1108 of 49 C.F.R. addresses arbitration of certain disputes subject to the jurisdiction of the Board, Part 1109 should treat with the mediation of certain disputes subject to the jurisdiction of the Board.<sup>3</sup> Accordingly, TAM recommends that Part 1109 be retitled **"PART 1109—MEDIATION OF CERTAIN DISPUTES SUBJECT TO THE JURISDICTION OF THE SURFACE TRANSPORTATION BOARD."**

The provisions of 49 C.F.R. §1109.1 are inconsistent with those of 49 C.F.R. §1109.4. The former allows 90 days, plus an additional 90 days if requested, for mediation of the issues noted for mediation in a pending Board proceeding, whereas the latter limits the time for mediation to 60 days. Moreover, 49 C.F.R. §1109.1 requires the parties to the proceeding to consent to the mediation, but 49 C.F.R. §1109.4 mandates mediation, regardless of whether the parties agree to the proposed mediation. In the opinion of TAM, 49 C.F.R. §1109.1 should be retitled "Invoking mediation in Board Proceedings" and rewritten to read, as follows;

"When mediation is sought by a party to a Board proceeding, the party shall file a petition indicating the matters which in its view are in dispute and may lend themselves to resolution by mediation and requesting that the proceeding be held in abeyance pending mediation. If the Board agrees and sets the matter for mediation, its decision

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<sup>3</sup> The current title, "USE OF ALTERNATIVE DISPUTE RESOLUTION IN BOARD PROCEEDINGS AND THOSE IN WHICH THE BOARD IS A PARTY," is confusing, because, to TAM's knowledge, the Board at no time has been a party to a mediation in a proceeding before the Board.

shall indicate how much time shall be allowed for the mediation. The period while any proceeding is held in abeyance to permit mediation will not be counted towards the statutory deadline, if any. If during the course of the mediation or upon its conclusion any party believes that the mediation is not yielding or has not yielded the intended result, the party may advise the Chief of the Section of Administration of the Office of Proceedings, who will reactivate normal agency proceedings by notice served on all parties.”

As previously recommended, the provisions of existing section 1109.2 should be stricken for their inconsistency with those of 49 C.F.R. §1108.11. In its stead, TAM recommends that 49 C.F.R. §1109.2 be retitled “Confidentiality in mediation proceedings” and revised to read, as follows:

“The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator or the opposite party or parties in the proceeding before the Board or in any other forum without the consent of the other party or parties. The provisions of 5 U.S.C. §574, added by the Administrative Dispute Resolution Act of 1996, shall be binding upon the mediator and the parties to the mediation.”

If the foregoing changes are made, 49 C.F.R. §1109.4, Mandatory mediation in rate cases to be considered under the stand-alone cost methodology, should be renumbered 49 C.F.R. §1109.3.

49 C.F.R. §1109.3(d) should have a sentence added at the end to read, as follows: “The provisions of 5 U.S.C. §574, added by the Administrative Dispute Resolution Act of 1996, shall be binding upon the mediator and the parties to the mediation.”

TAM recommends that the Board be empowered to order mandatory mediation in other proceedings and, accordingly, suggests the insertion of 49 C.F.R. §1109.4. Mandatory mediation in other proceedings before the Board. Its subparagraphs would read, as follows:

“(a) If at any time during the course of a pending proceeding before it, the Board is of the view that certain issues dividing the parties lend themselves to being resolved or narrowed through mediation, the Board will notify the parties of its determination and will assign a mediator to mediate the matters in dispute. Within five business days of the assignment to mediate, the mediator will contact the parties to discuss the ground rules for the mediation and set the time and location of any meeting. At least one principal of each party, who has the authority to bind the party, shall participate in the mediation and be present at any session at which the mediator requests that the principals be present.

(b) The mediator will work with the parties to try to reach a settlement of some or all of the issues in dispute or to narrow the issues in dispute and try to reach stipulations or agreements of the parties which may be incorporated into any adjudication before the Board if mediation does not fully resolve the parties' disagreement. If the parties reach a settlement, the mediator may assist in preparing a settlement agreement.

(c) The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator or the opposing party or parties in the proceeding before the Board or in any other forum without the consent of the other party or parties. The provisions of 5 U.S.C §574, as added by the Administrative Dispute Resolution Act of 1996, shall be binding upon the mediator and the parties to the mediation.

(d) The mediation shall be completed within 60 days of the appointment of the mediator. The mediation may be terminated prior to the end of the 60-day period only with the certification of the mediator to the Board. Requests to extend the mediation, or to re-engage it later, will be entertained on a case-by-case basis, but only if filed by all interested parties.

(e) If the Board sets a matter for mandatory arbitration, it will revise any procedural schedule which it may have prescribed to allow for the 60-day mediation period and, if required, any extension thereof."

#### Miscellaneous

If, as TAM recommends, the Board provides for greater use of both voluntary and mandatory mediation, it may have the need for qualified mediators beyond those employed by the agency. The Board, accordingly, may want to provide for the establishment of a roster of qualified persons, those experienced in rail transportation or economic issues similar to those arising before the Board, who would be available to serve as mediators of disputes pursuant to 49 C.F.R. Part 1109. The establishment of such a roster would be similar to the Board's action in STB Ex Parte No. 586,

Arbitration—Various Matters Relating to its Use as an Effective Means of Resolving Disputes That Are Subject to the Board's Jurisdiction, served September 20, 2001.

The Board is not represented on the Alternative Dispute Resolution Working Group, established pursuant to President Clinton's Memorandum for Heads of Executive Departments and Agencies, dated May 1, 1998, and administered by the U.S. Attorney General. The Chairman should request the Attorney General that he be designated as the

Board's representative or by delegation, pursuant to 49 C.F.R. §1011.7(b), the Chief of the Office of Proceedings.

The heading of 49 C.F.R. **Part 1110—PROCEDURES GOVERNING INFORMAL RULEMAKING PROCEEDINGS** is incorrect, for it describes the procedures for rulemaking proceedings generally. The word "INFORMAL", accordingly should be stricken from the heading. Subparagraph (c) should be amended by striking the word "and" at the end of paragraph 6, inserting the word "and" at the end of paragraph 7 and adding another paragraph to read, as follows:

"(8) The effect of the proposed rule pursuant to the provisions of the Unfunded Mandates Reform Act of 1995, the Paperwork Reduction Act of 1995, Executive Order 12988 (Civil Justice Reform), Executive Order 12630 (Taking of Private Property), Executive Order 13132 (Federalism), Executive Order 12372 (Intergovernmental Review) and Executive Order 13211 (Energy Effects)."

TAM is unaware that the Board has any employee boards, except the Accounting Board referred to at 49 C.F.R. §1011.5. Therefore, the heading of 49 C.F.R. §1011.5 should be changed from "Employee boards" to "Accounting Board". Since there are no other employee boards, **PART 1118—PROCURE IN INFORMAL PROCEEDINGS BEFORE EMPLOYEE BOARDS** and **PART 1119—COMPLIANCE WITH BOARD DECISIONS** should be removed from C.F.R. following publication of a notice of proposed rulemaking in the Federal Register. Nevertheless, a sentence or two relating to the procedure before the Accounting Board should be added to 49 C.F.R. §1011.5. TAM recommends that subparagraph (b) be redesignated as subparagraph (c) and that a new subparagraph be inserted, as follows:



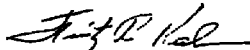
"(b) Appeals from decisions of the Accounting Board will be decided by the Board. Appeals must be filed within ten days of the after the date of the Accounting Board's action. Appeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."

As the Board no longer has authority to regulate motor carrier rates, **PART 1139—PROCEDURES IN MOTOR CARRIER REVENUE PROCEEDINGS** should be removed from C.F.R. after publication of a notice of proposed rulemaking in the Federal Register.

Respectfully submitted,

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By its attorney,



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Dated: October 4, 2010